

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	MB Docket No. 03-15
Second Periodic Review of the)	
Commission's Rules and Policies)	RM 9832
Affecting the Conversion to Digital Television)	

To: The Commission

**OPPOSITION OF ECHOSTAR SATELLITE L.L.C. TO
NEXSTAR BROADCASTING, INC.'S PETITION FOR RECONSIDERATION**

EchoStar Satellite L.L.C. ("EchoStar") hereby submits its Opposition to the Petition for Reconsideration filed by Nexstar Broadcasting, Inc. ("Nexstar")¹ concerning the Commission's Report and Order in the *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*.² Nexstar asks the Commission to reconsider and extend the replication and maximization deadlines set forth in the *Order*. Doing so would effectively be contrary to the recently enacted Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),³ which allows satellite carriers to retransmit distant digital network stations to households tested to receive an inadequate digital signal from the local station, unless the FCC makes certain findings upon a showing by the broadcaster. Extension of

¹ Petition for Reconsideration of Nexstar Broadcasting, Inc. (dated Nov. 3, 2004) ("Nexstar Pet."), placed on Public Notice by FCC Report No. 2684 (dated Dec. 1, 2004), published in Federal Register at 70 Fed. Reg. 1252 (Jan. 6, 2005).

² Report and Order, FCC 04-192 (rel. Sept. 7, 2004) ("*Order*").

³ Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447.

the deadlines would delay the onset of that ability in certain circumstances and absolve the broadcasters from the need to make any showing about the reasons for not replicating their analog contours, in violation of SHVERA and to the detriment of the public.

I. INTRODUCTION AND SUMMARY

EchoStar has long urged that decisive Commission action is needed to spur broadcasters on to fulfillment of their digital television (“DTV”) service obligations.⁴ In the *Order*, the Commission has finally effectuated a longstanding plan to set a firm deadline for television broadcast licensees to complete the build-out of their licensed DTV facilities and either replicate their analog service areas or maximize their service coverage as provided in their licenses. The penalty for failure to comply with the *Order*’s July 1, 2005 and July 1, 2006 deadlines (for top-four network stations in markets 1-100, and all other DTV licensees, respectively) is loss of interference protection in the areas the licensee fails to serve.⁵

Citing data revealing that some **60%** of operating commercial DTV stations are on the air with less than full power facilities,⁶ the *Order* declared that the public can no longer be expected to wait for broadcasters to fulfill their service commitments:

⁴ See, e.g., Letter from Charles W. Ergen, EchoStar Satellite Corporation, to Michael K. Powell, Chairman, FCC (dated Sept. 27, 2001) (proposing that satellite services be allowed to import a distant network high definition television (“HDTV”) signal to markets where local network affiliates had not built DTV facilities; *Ex Parte* Letter from Pantelis Michalopoulos, Counsel for EchoStar, to Michael K. Powell, Chairman, FCC, MB Docket No. 03-15 (dated Mar. 4, 2004) (elaborating on the foregoing proposal and suggesting that satellite services also be permitted to import a distant network HDTV signal to “digital unserved” households in the Grade B service areas of local network affiliates that failed to build full power DTV facilities); *Ex Parte* Letter from Pantelis Michalopoulos, Counsel for EchoStar, to Michael K. Powell, Chairman, FCC, MB Docket No. 03-15 (dated Apr. 13, 2004) (responding to the National Association of Broadcasters’ vehement opposition to the foregoing proposals of EchoStar).

⁵ *Order*, ¶ 78.

⁶ See *id.* ¶ 81 (“[a]pproximately 45 percent of [commercial and non-commercial] broadcasters currently on the air have built licensed facilities and are operating at full power”)

We believe that the time has come to ensure that consumers have access to a full range of digital programming services from their local broadcast stations.

* * *

We have given broadcasters ample opportunities over the past years to expand their service areas, and advance warning that if they elect not to provide their viewers with DTV that the Commission may ensure that the area is served in other ways.⁷

Under the Commission's framework, errant broadcasters' loss of interference protection for the areas they neglect will pave the way for other parties to serve those areas.⁸

Significantly, since the Commission adopted the *Order*, Congress has weighed in on the issue and created an additional mechanism for getting network DTV service to neglected areas. SHVERA, which was signed into law on December 8, 2004, will allow Direct Broadcast Satellite ("DBS") operators such as EchoStar to provide network DTV service to households tested to receive an inadequate digital signal from their local network station.⁹ Loss of interference protection for failure to replicate or maximize a station's contours is a prerequisite to this provision for some, but not all, stations.

Specifically, starting April 30, 2006 for the top-100 markets households located within the analog Grade B contour of a network station that has lost interference protection can

and Appendix D (in which the FCC reports that the figure for **commercial** broadcast stations is even lower – of 1137 commercial stations on the air, only 452, or slightly less than 40%, are operating their fully licensed facilities).

⁷ *Id.*, ¶¶ 79, 109.

⁸ *See id.* at ¶ 109 (the Commission will dismiss any applications and cancel any construction permits for facilities in excess of those in actual operation by the application interference protection deadline, require broadcasters to file applications for licenses to cover their actual facilities in operation as of the deadline, and will accept applications from other existing DTV licensees to serve the neglected areas).

⁹ *See* Pub. Law 108-447, Title IX, Sec. 204 (*to be codified as* 47 U.S.C. § 339(a)(2)).

obtain a distant digital network signal if a signal test reveals that the household receives a signal from the local network affiliate that is weaker than the minimum specified in the Commission's rules.¹⁰ Stations can block such households from obtaining a distant digital network station in limited and specifically enumerated circumstances. Examples include cases where the local network affiliate has not built full facilities due to zoning impediments or the need for international coordination or approvals. Importantly, financial exigency is *specifically excluded* as a ground upon which a broadcaster can seek to block distant digital satellite service to digital unserved households.¹¹

As the foregoing discussion indicates, an important trigger for allowing DBS to serve digital unserved households in many cases is a local network affiliate's loss of interference protection. Such loss, in turn, is triggered by failure to meet the replication/maximization deadlines set by the *Order*. The existence of the deadlines is, therefore, a predicate to the new mechanism Congress has created for making network DTV signals available by satellite to consumers who would otherwise be disenfranchised by their local network affiliate's dilatory conduct. Nexstar, however, seeks to postpone these deadlines for an unspecified time period.¹²

¹⁰ See *id.* Note that digital signal strength testing will be permitted in areas where top-100 market network stations have received a tentative DTV channel designation that is the same as their current digital channel regardless of whether such stations have lost interference protection. Additionally, testing may commence on July 15, 2007 with respect to all stations not covered by the April 30, 2006 commencement date.

¹¹ *Id.* ("Upon request by a local network station, the Commission may grant a waiver with respect to such station to the beginning of testing under clause (vii), and prohibit subscribers from receiving digital signal strength testing with respect to such station. ... The Commission may only grant such a request upon submission of clear and convincing evidence that the station's digital signal coverage is limited due to the unremediable presence of one or more of the following.... Under no circumstances may such a waiver be based upon financial exigency.").

¹² See Nexstar Pet. at 5-6.

The delay Nexstar seeks would contravene the SHVERA directive and ensure that there will be no end in sight for the DTV disenfranchisement experienced by many consumers, and no end in sight for the DTV transition. Nextar's request should be summarily rejected.

While Nexstar cites financial woes and logistical problems as justification for continued foot-dragging by broadcasters, these excuses are unavailing. The Commission has correctly concluded that broadcasters have had more than enough time to arrange for completion of their full power DTV facilities, a matter Congress has unequivocally confirmed by prohibiting broadcasters from using financial exigency (or any reason other than the specific ones enumerated in SHVERA) as an excuse for blocking satellite operators from serving digital white areas under SHVERA. To the extent that Nexstar or other broadcasters have excuses for further delays that are viewed by Congress as legitimate, those claims can be evaluated by the Commission on a case by case basis, as Congress contemplated in SHVERA. But, now that the Congress and Commission have made their expectations clear, there simply is no plausible excuse for depriving viewers and the general public of the DTV transition's benefits any longer.

II. THE TIME HAS LONG SINCE PASSED FOR THE ACCOMMODATION NEXSTAR SEEKS

A. Broadcasters Have Been Aware For Several Years of the DTV Transition's Requirements

There is no justification for further delay in expecting broadcasters to meet the maximization and replication obligations they agreed to undertake when they obtained their DTV licenses. The Commission did not require broadcasters to replicate or maximize their service areas as a condition of receiving a DTV license.¹³ But to encourage stations to fully serve their analog service areas with digital signals and to help safeguard consumer investment in the digital

¹³ See Order ¶ 72.

transition, the Commission decided that upon a date certain, non-replicating stations would be deprived of interference protection for any unreplicated areas.¹⁴

Broadcasters have long been aware that the DTV transition, at some point, would come to an end, and that broadcasters' digital facilities would have to be complete. Specifically, the planned 2006 deadline for the transition's end dates from before its codification by the Balanced Budget Act of 1997.¹⁵ And soon after the deadline's codification, the Commission set out a DTV construction schedule with the aim of accomplishing the transition by 2006, putting broadcasters on undeniable notice that they had to finish their facilities.¹⁶

Broadcasters who built less than their fully licensed facilities were further aware that a deadline loomed for meeting their full power obligations. Indeed, in a 2001 order, the Commission originally set December 31, 2004 as the deadline for loss of interference protection by stations that did not replicate their analog Grade B contours.¹⁷ After broadcasters persuaded the Commission to defer the deadline, the Commission warned that a new interference protection

¹⁴ *See id.*

¹⁵ *See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 99 (1997) ("Specifically, we believe that a target of 2006 for the cessation of analog service is reasonable.").

¹⁶ *Id.* All commercial television stations had until May 1, 2002 (at the latest) to complete construction of their digital facilities, unless they specifically obtained an STA permitting them to operate at low power thereafter, again with an understanding that firm deadlines for full power build-out would be forthcoming. *See In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 5946, 5951 (rel. Jan. 19, 2001) ("DTV R&O").

¹⁷ *See In the matter of Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 20594, 20603 (rel. Nov. 15, 2001) ("DTV R&O Recon. Order").

deadline would be established in the future.¹⁸ Such deadlines were proposed by the Commission in 2003, and it took more than a year for them to finally be adopted in September 2004.

In sum, since at least 1997, broadcasters have been aware that they would have to complete their DTV facilities. And from 2001 to now, they specifically have been aware that by a certain deadline, they would have to operate at their full licensed power or lose interference protection. This years-long span of time was more than sufficient for broadcasters to arrange for construction of their full power facilities. However, instead of preparing for this inevitability, broadcasters balked at the Commission's schedule from the beginning, persuading the Commission to agree to a number of delays and extensions.¹⁹ Nexstar appears to be among these broadcasters, and now makes the remarkable assertion that the time already afforded to broadcasters is unreasonable.

B. Financial Exigency Is Not An Acceptable Ground For Delaying The Replication And Maximization Deadlines

Nexstar asserts that financial hardship is a justifiable reason for failure to build out full power facilities. In its view, this hardship necessitates the elimination of the *Order's* replication and maximization deadlines.²⁰ As discussed above, however, Congress has spoken on the issue, and SHVERA makes plain that if broadcasters fail to build out, they cannot use

¹⁸ See *id.* ¶¶ 24, 29.

¹⁹ See, e.g., *In the Matter of Remedial Steps For Failure to Comply with Digital Television Construction Schedule*, Report and Order and Memorandum Opinion and Order on Reconsideration, MM Docket No. 02-113, FCC 03-77 (rel. Apr. 16, 2003) (providing a background of the various extension and waiver proceedings prior to April 2003). The 2006 deadline for the transition is now widely viewed as unattainable, due in significant part to broadcasters' failure to make DTV service broadly available to the public.

²⁰ See *Nexstar Petition* at 2-4.

financial exigency as an excuse to prevent others from serving their neglected viewing areas. A sponsor of the legislation stated:

One of the most exciting benefits of this legislation is that it creates incentives and pressures to speed the return of this valuable analog spectrum. . . . The purpose of this legislation is simple; to make sure that consumers are not denied digital television based on where they live or whether the digital conversion has been completed in their area. . . . With the passage of the Balanced Budget Act of 1997, the Congress established a timeline for catching up our nation's television broadcasting with rapidly changing technology. In fact, we gave broadcasters a multi-billion dollar public asset in the form of free spectrum for digital television with the explicit understanding that their analog spectrum be returned by December 31, 2006. Unfortunately, years of litigation, lobbying and foot dragging has made it likely that we will miss this deadline.²¹

It follows that granting Nexstar's request – in essence giving broadcasters a wholesale “pass” on meeting replication deadlines and permitting them to maintain interference protection despite their dilatory conduct – would be contrary to the intent of Congress as expressed in SHVERA. Nexstar and other broadcasters have had approximately eight years to generate the funding necessary to complete the buildout, and still have time before the replication and maximization deadlines set in. Given how long Nexstar and other broadcasters have had to prepare, there is no reason why an extension is justified at this point, and no indication that Nexstar will not argue financial hardship again when a future deadline draws near. Any claims of excuses found by Congress in SHVERA to be legitimate can and should be adjudicated on a case by case basis.

C. Nexstar's Assertions Regarding a Lack of Tower Crews Are Implausible

Nexstar also argues that meeting the build-out deadlines is not feasible due to a lack of tower construction crews. Although the availability of tower crews was raised as an issue

²¹ 150 Cong. Rec. S11,766 (daily ed. Nov. 20, 2004) (statement of Sen. Ensign).

and reported in the trade press in the late 1990's, no recent reports reiterate this concern. It should also be noted that the earlier reports do not take into account the likelihood that new tower construction firms were attracted to the market as the transition wore on, advances in construction technology and methodology, and advances in tower-sharing mechanisms. Such factors likely ameliorated concerns about an insufficient number of crews, particularly if best efforts were made toward compliance with construction deadlines at the outset.

In any event, the availability of tower construction crews is strictly a financial issue. Particularly in an economy where there is no general labor shortage, such crews can be fully manned and available if adequately compensated. Tower construction crew shortage is accordingly not one of the categories recognized as "legitimate" by SHVERA, and falls squarely within the category of financial exigency.

III. NEXSTAR'S PETITION SHOULD BE DISMISSED AS REPETITIOUS

In addition to the substantive reasons for denying Nexstar's petition, the petition should be dismissed because it is repetitious. Under Commission precedent, it is clear that "the Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented."²² Were the Commission to consider all petitions for

²² See *In the Matter of Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures*, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd. 10180, 10212 (2003) ("The Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented."); *In the Matter of Sioux Valley Rural Television, Inc., License No. IVM289B; Request for Remedial Bidding Credit and Refund*, Memorandum Opinion and Order, 17 FCC Rcd. 19344, 19348 (2002) ("[T]he Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented, especially where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration. Otherwise, the Commission would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion. Moreover, repetitious petitions such as this one can potentially delay judicial review where the request places again before the Commission the same issues it has already

reconsideration despite having exhausted the analysis of a topic, “the Commission would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion.”²³ Concerns regarding purported lack of funding and unavailability of tower crews have been exhaustively discussed since the inception of the DTV transition and were expressly mentioned by the Commission in the *Order*.²⁴ Thus, Nexstar merely re-argues issues the Commission has already considered, which is an inappropriate grounds for asserting a reconsideration request.

IV. CONCLUSION


In conclusion, the Commission should adhere to its firm deadlines for replication/maximization to help move the DTV transition forward. Such action is in the public interest and is consistent with Congressional intent. The Commission should accordingly deny Nexstar’s Petition for Reconsideration.

addressed with respect to the same party or similar parties in the past in other contexts.”) (“*Sioux Valley*”); In re Applications of *Baker Protective Services, Inc.*, Order, 1984 FCC LEXIS 2184 (1984) (“Air-Beep's petition for reconsideration will be denied because it seeks to re-argue questions which were fully considered either at the hearing by the Chief Administrative Law Judge or on appeal by the Review Board.”).

²³ See *Sioux Valley*, 17 FCC Rcd. at 19348.

²⁴ See *Order* at n.164 (citing to comments regarding financial inefficiencies of full replication/maximization); *id.* at n.313 (“According to Public Television, 80 percent of the noncommercial stations filing extension requests cited technical reasons (including lack of tower crews ...)”).

Respectfully submitted,



Pantelis Michalopoulos

Rhonda M. Bolton

Lee C. Milstein

Steptoe & Johnson LLP

1330 Connecticut Avenue NW

Washington, D.C. 20036

(202) 429-3000

Counsel for EchoStar Satellite L.L.C.

Karen E. Watson

EchoStar Satellite L.L.C.

1233 20th Street, N.W.

Washington, DC 20036

(202) 293-0981

Lori Kalani

EchoStar Satellite L.L.C.

9601 South Meridian Blvd.

Englewood, CO 80112

(303) 723-1000

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CERTIFICATE OF SERVICE

I, Lee C. Milstein, hereby declare that copies of the foregoing Opposition to Nexstar Broadcasting, Inc.'s Petition for Reconsideration were sent on this 21st day of January, 2005 by United States Postal Service to the following:

Howard M. Liberman
Elizabeth Hammond
Drinker Biddle & Reath LLP
1500 K Street, N.W., Suite 1100
Washington, DC 20005
Counsel to Nexstar Broadcasting, Inc.

Donald G. Everist, President
Cohen, Dippell and Everist, P.C.
1300 L Street, N.W., Suite 1100
Washington, DC 20005

William F. Hammett, P.E., President
Dane E. Erickson, P.E., Sr. Engineer
Robert D. Weller, P.E., Sr. Engineer
Hammett & Edison, Inc.
Consulting Engineers
Box 280068
San Francisco, CA 94128-0068

Lewis J. Paper
Andrew S. Kersting
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, DC 20037-1526
Counsel to ACME Communications, Inc.

Kevin F. Reed
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W., Suite 800
Washington, DC 20036-6802
Counsel to Cox Broadcasting, Inc.

John R. Feore, Jr.
John S. Logan
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Washington, DC 20036-6802
*Counsel to Paxson Communications Corp.;
Counsel to the Paxson Licensees; and
Counsel to the Liberty Corporation*

Kathryn R. Schmeltzer
Tony Lin
Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037
Counsel to Sinclair Broadcast Group, Inc.

Michael D. Petricone, Esq.,
V.P., Technology Policy
Julie M. Kearney, Esq.
Sr. Dir., Regulatory Affairs
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201

Dennis P. Corbett
Katrina C. Gleber
Leventhal Senter & Lerman PLLC
2000 K Street, N.W., Suite 600
Washington, DC 20006
Counsel to Ramar Communications II, Ltd.

Timothy Collings
Canadian V-chip Design Inc.
Simon Fraser University
Burnaby, British Columbia
Canada V5A 1S6

Najmul H. Siddiqui, CEO
Tri-Vision International Ltd.
41 Pullman Court
Scarborough, Ontario
Canada M1X 1E4

Vincent A. Pepper
Womble Carlyle Sandridge & Rice
1401 Eye Street, N.W., 7th Floor
Washington, DC 20005
*Counsel to Television Capital Corp. of
Portland*



Lee C. Milstein